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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HASKELL CANYON PARTNERS, L.P., Cross-complainant and Appellant, v. E&M CONCRETE CONSTRUCTION, INC., Cross-defendant and Appellant.	B215200 (Los Angeles County Super. Ct. No. BC356201)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter D. Lichtman, Judge. Affirmed.

Jacobson & Associates and Daniel Lee Jacobson for Cross-defendant and Appellant.

Wood, Smith, Henning & Berman, Stephen J. Henning, Stacey Friedman Blank and Carlo A. Coppola for Cross-complainant and Appellant.

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In the underlying action, the plaintiffs asserted claims regarding construction defects in their homes against Haskell Canyon Partners, L.P. (Haskell) and E&M Concrete Construction, Inc. (E&M); Haskell sought equitable indemnity from E&M. After E&M entered into a settlement with the plaintiffs, the trial court found that settlement was made in good faith (Code Civ. Proc., § 877.6), dismissed Haskell's cross-complaint against E&M, and awarded $2,000 in attorney fees to E&M as the prevailing party in Haskell's cross-action.[1] E&M has appealed, contending that the award is inadequate, and Haskell has cross-appealed, contending that the award was improper. We affirm the fee award.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The underlying construction defect action concerns approximately 69 homes in Santa Clarita and Saugus. In September 2006, the plaintiff homeowners initiated the action against Haskell as "developer[] and/or general contractor[]." Haskell filed a cross-complaint against E&M and other parties, asserting claims for implied contractual indemnity, equitable indemnity, express contractual indemnity, breach of express and implied warranties, breach of contract, and declaratory relief. On June 21, 2007, the plaintiffs filed their fourth amended complaint, which contains several claims against a class of defendants denominated as "developer defendants," including Haskell, and a single claim of negligence against all the defendants. The plaintiffs later named E&M as a "Doe" defendant.

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[1] All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

In September 2007, E&M sought judgment on the pleadings regarding Haskell's cross-complaint, contending that its claims failed insofar as they relied on the agreement between Haskell, as general contractor, and E&M, as subcontractor. E&M argued that the cross-complaint did not allege that Haskell was a licensed contractor, as required under Business and Professions Code section 7031, subdivision (a), which bars unlicensed contractors from "maintain[ing] any action" for contract-based compensation.[2] E&M maintained that only the cross-complaint's claim for equitable indemnity was not contract-based. On September 21, 2007, prior to the hearing on E&M's motion for judgment on the pleadings, Haskell dismissed its claims against E&M, with the exception of the claim for equitable indemnity.

On December 17, 2007, the trial court entered a stipulated case management order (CMO) stating in pertinent part: "All [d]efendants and [c]ross-defendants appearing in this [a]ction . . . are deemed to have filed and served cross-complaints for implied and equitable indemnity, apportionment of fault, and declaratory relief against one another. . . . Parties who wish to opt out of the deemed cross-complaint provision may file a notice of opting out."

In January 2008, E&M informed the trial court that the plaintiffs had agreed to settle their claims against E&M for $18,600, and requested a determination that the settlement was made in good faith. E&M asserted that it had provided

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[2] Absent qualifications not pertinent here, subdivision (a) of Business and Professions Code section 7031 provides that "no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required . . . without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person."

concrete in 34 of the pertinent homes, and knew of no defects in its work. According to E&M, it was settling the case simply “to buy peace.” Haskell opposed the request on several grounds, including that E&M had worked on 47 homes, and that the settlement amount was disproportionate to E&M’s share of the approximately $7 million in damages sought by the plaintiffs, which Haskell estimated to be $65,804.68. On February 19, 2008, E&M took its request for a good faith determination off calendar.

In early March 2008, E&M submitted a notice that it had “opt[ed] out” of the CMO’s provision regarding the deemed filing of cross-complaints. On March 25, 2008, E&M told the trial court that on February 29, 2008, following further negotiations, the plaintiffs had agreed to settle their claims against E&M for $28,200, predicated on the assumption that E&M had worked on 47 homes. E&M asked the trial court to determine that the settlement was made in good faith. In opposing the request, Haskell submitted a declaration from a construction defect expert, who opined that E&M’s share of the damages claimed by the plaintiffs was at least $155,443.33. In May 2008, the trial court denied E&M’s request without prejudice, concluding that E&M had submitted insufficient evidence regarding its potential liability for damages.

On June 19, 2008, E&M renewed its request for a determination that the $28,200 settlement agreement had been made in good faith. The request was supported by a declaration from a construction defect expert, who asserted that he had found no deficiencies in E&M’s work on the homes. Later, on June 27, 2008, Haskell requested a good faith determination regarding a settlement agreement that Haskell and a group of subcontractor defendants -- that did not include E&M and several other defendants -- had negotiated with the plaintiffs. Under the settlement, the plaintiffs agreed to dismiss their claims against Haskell and the participating subcontractors for a payment of $805,000. On July 28, 2008, the trial court found that both settlements had been made in good faith, and dismissed Haskell's cross-complaint against E&M.

On September 15, 2008, E&M sought an award of $125,160 in attorney fees as costs pursuant to a fee provision in its agreement with Haskell. According to the fee motion and supporting evidence, E&M's insurer paid E&M's counsel a retainer fee of $7,500 to perform the legal services that resulted in E&M's settlement with the plaintiffs. The motion requested a fee award of $125,160, which E&M's counsel estimated was the reasonable value of his services, based on 312.9 hours of work at a rate of $400 per hour.

Haskell opposed E&M's request for a fee award on numerous grounds. Haskell contended that E&M was not a prevailing party for purposes of a cost award, arguing that E&M's tardy election to "opt out" under the CMO's "deemed cross-complaint" provision had been ineffective, and that the July 28, 2008, good faith determinations had "effectively extinguished" the parties' cross-complaints against each other "at the exact same time." In addition, Haskell asserted that the doctrine of judicial estoppel barred the request, as E&M had sought judgment on the pleadings on the ground that Haskell's agreement with E&M -- which contained the fee provision -- was void under Business and Professions Code section 7031, subdivision (a). Haskell also maintained that E&M was not the prevailing party within the meaning of the contractual fee provision.

The hearing on E&M's request for a fee award was held on October 21, 2008. The trial court rejected Haskell's contention that E&M had failed to opt out under the CMO's "deemed cross-complaint" provision, noting that the CMO lacked a deadline for opting out.[3] The trial court also concluded that judicial estoppel did not bar a fee award to E&M, and that E&M constituted the prevailing party for purposes of a fee award. Observing that the action was "a garden variety construction defect case" in which E&M had received a negotiated fee of $7,500, the trial court determined that E&M was entitled to a fee award of $2,000.[4]

DISCUSSION

On appeal, Haskell challenges the propriety of the fee award, and E&M attacks the amount of the award. As explained below, we find no error in the trial court's rulings.

A. *Governing Principles*

Attorney fees are not recoverable as costs unless expressly authorized by statute or contract. (Code Civ. Proc., §§ 1021, 1033.5.) Here, E&M sought a fee award as an item of costs pursuant to the attorney fee provision of its agreement with Haskell, which states in pertinent part: "In the event that [E&M] prevails in

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3 In so concluding, the trial court remarked that the omission of a deadline constituted a "loophole" in the provision. The trial court explained that the CMO incorporated standard terms -- including the "deemed cross-complaint" provision -- that attorneys specializing in construction defect litigation had crafted to ensure that "everything is done by consensus and done efficiently." To promote this goal, the "deemed cross-complaint" provision guaranteed that when an action ended with a global settlement, the parties "walk[ed] away from their cross-actions and [] nobody is deemed the prevailing party." The trial court stated that it would recommend to counsel in future construction defect actions that the case management order incorporate a deadline for "opt[ing] out."

4 The trial court also awarded an additional $1,110 to E&M in costs. Haskell has not challenged this ruling on appeal.

any . . . court action arising out of this Agreement or the enforcement or breach thereof, or in any action brought against [Haskell] by third parties[,] in which [E&M] is joined as a party or inter[]pleads, whether the same proceeds to judgment or not, [Haskell] agrees to pay [E&M] reasonable attorney's fees. . . ."

"Whether a party to litigation is entitled to recover costs is governed by Code of Civil Procedure section 1032, which provides, in subdivision (b), that '[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.' For the purpose of determining entitlement to recover costs, Code of Civil Procedure section 1032 defines 'prevailing party' . . . ." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*).) In this regard, subdivision (a)(4) of section 1032 states: "'Prevailing party' includes . . . a defendant in whose favor a dismissal is entered . . . ." Generally, a party that falls under this characterization is entitled to its costs as a matter of right. (*Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.* (1996) 47 Cal.App.4th 886, 890.) Here, E&M's good faith settlement with the plaintiffs and the dismissal of the plaintiffs' claims against E&M authorized E&M to recover its costs as the prevailing party on Haskell's cross-complaint for equitable indemnity. (*Id*. at pp. 889-891; *Great Western Bank v. Converse Consultants, Inc*. (1997) 58 Cal.App.4th 609, 612-614.)

As the prevailing party for purposes of a costs award is not automatically entitled to a contract-based fee award, E&M was required to demonstrate its right to an award under the fee provision. (*Santisas*, *supra*, 17 Cal.4th at p. 606.) When, as here, the fee provision "does not define 'prevailing party' . . . , a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. [Citation.]" (*Id*. at p. 622.)

To the extent the trial court resolved questions of law in issuing the fee award, we review the determinations de novo. (*Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431.) To the extent the award constitutes a fact-sensitive decision, we review the ruling for an abuse of discretion. Under this standard of review, "[t]he trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice." (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545.)

B. *E&M's Entitlement To Award*

In challenging the fee award, Haskell advances several contentions with a common theme, namely, that E&M's motion for judgment on the pleadings foreclosed its entitlement to a contract-based award. In addition, Haskell argues that the terms of the fee provision do not support an award to E&M. For the reasons explained below, we reject these contentions.

1. *Judicial Estoppel*

We begin with Haskell's challenges predicated on E&M's motion for judgment on the pleadings, which asserted that Haskell's contract-based claims against E&M failed for want of an allegation that Haskell was a licensed contractor. Haskell argues that the doctrine of judicial estoppel precluded the fee award to E&M; that the trial court failed to determine whether the contract between Haskell and E&M was, in fact, valid; and that E&M's attack on the contract's validity barred it from seeking a contract-based fee award.

Haskell's reliance on judicial estoppel is misplaced. The equitable doctrine of judicial estoppel is aimed at preventing fraud on the courts. (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.) No such fraud occurred here. As explained in *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, fn. omitted (*Jackson*), the doctrine applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" Because E&M withdrew its motion for judgment on the pleadings after Haskell dismissed its contract-based claims against E&M, no tribunal ever adopted the view -- implied by E&M's motion -- that Haskell's contract with E&M was illegal due to Haskell's lack of a contractor's license.[5]

Haskell's contention regarding judicial estoppel and its related contentions fail for a second reason: E&M was entitled to enforce the fee provision in the contract between Haskell and E&M, even if -- as suggested in E&M's motion for judgment on the pleadings -- Haskell could not assert claims based on the contract because it lacked a contractor's license. Generally, an aggrieved and innocent party to an agreement with an unlicensed contractor may obtain appropriate relief

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[5] Pointing to a footnote in *Jackson*, Haskell argues that E&M's motion for judgment on the pleadings worked an estoppel even though the trial court never ruled on the motion. We disagree. The pertinent footnote states: "Under the majority view, the party sought to be estopped must have been successful in asserting the earlier position. [Citations.] If the earlier position was not adopted by the tribunal, there is no danger of inconsistent results and thus no impairment of the judicial process. [Citations.] Nevertheless, judicial estoppel is an equitable doctrine. [Citations.] Consequently, we cannot rule out the possibility that, in a future case, circumstances may warrant application of the doctrine even if the earlier position was not adopted by the tribunal. [Citation.]" (*Jackson, supra,* 60 Cal.App.4th at pp. 183-184.) As Haskell has identified no circumstances justifying a departure from the majority rule and we otherwise discern none, we apply the rule here.

notwithstanding the illegality of the agreement. (*Owens v. Haslett* (1950) 98 Cal.App.2d 829, 835.)

The principles underlying such relief are explained in *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141 (*Lewis & Queen*). Noting that Business and Professions Code section 7031 is intended to "deter[] unlicensed persons from engaging in the contracting business," our Supreme Court explained: "[W]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not in pari delicto. [Citations.] [¶] . . . The class protected by [Business and Professions Code section 7031] includes those who deal with a person required by the statute to have a license. When the person required to have a license is a general contractor, then the protected class includes subcontractors, materialmen, employees, and owners dealing with the general contractor." (*Lewis & Queen*, *supra*, 48 Cal.2d at pp. 151, 153.)

Although we have not found -- nor has either party cited -- a case addressing whether an innocent contractor may enforce the fee provision of an agreement with an unlicensed general contractor, we find guidance on this issue from *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077. There, the plaintiff rescinded a real estate purchase agreement on the grounds that the defendant had violated the Subdivided Lands Act (Bus. & Prof. Code, § 11000 et seq.), but requested a fee award under a provision of the agreement. (98 Cal.App.4th at pp. 1080-1081.) Relying on the principles stated in *Lewis &*

Queen, the appellate court concluded that the plaintiff was entitled to enforce the fee provision even though he had voided the agreement, reasoning that "[t]o deny plaintiff the attorney fees to which he is entitled as a result of the contract would permit [the] defendant to benefit from the illegality that it created, thus disserving the goal of deterring illegal conduct." (*Id*. at p. 1083.) As prohibiting E&M from enforcing the fee provision here would have similar results, we reach the same conclusion.

In short, Haskell's claim that E&M's motion for judgment on the pleadings barred it from recovering a fee award fails. Judicial estoppel does not bar the fee award, as the request was not "totally inconsistent" with its motion. Moreover, contrary to Haskell's contention, the court was not required to determine the validity of the contract; E&M's motion did not challenge the validity of the contract *per se*, but rather Haskell's entitlement to recover on it. E&M's ultimate entitlement to a fee award – which we examine below – thus depends on whether the terms of the fee provision permitted an award to E&M as the prevailing party in the cross-action.

2. *Fee Provision*

Haskell's principal contention is that the scope of the fee provision is too narrow to permit an award in connection with the claim for equitable indemnity, which is not contractual in nature.[6] As our Supreme Court has explained,

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[6] On a related matter, Haskell argues that E&M was not entitled to a fee award as the prevailing party under section 1717, which proscribes an award in connection with contract-based claims when an action had been dismissed voluntarily or as the result of a settlement. (*Santisas, supra*, 17 Cal.4th at pp. 617-619.) However, nothing before us suggests that the trial court issued an award to E&M under section 1717.

"[w]hether attorney fees incurred in defending tort or other noncontract claims are recoverable . . . depends upon the terms of the contractual attorney fee provision." (*Santisas, supra,* 17 Cal.4th at p. 602; see also *Exxess Electronixx v. Heger Realty Corp.* (1988) 64 Cal.App.4th 698, 713 ["As with tort claims, the question of whether to award fees on other noncontract claims depends upon the scope of the contractual [] fee provision."])

In addressing Haskell's contention, "we apply the ordinary rules of contract interpretation. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation. [Citation.] Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]'" (*Santisas*, *supra*, 17 Cal.4th at p. 608, quoting *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.)

Here, as noted above (see pt. A., *ante*), the fee provision permitted E&M to recover its fees as prevailing party "in any . . . court action arising out of this Agreement or the enforcement or breach thereof, or in any action brought against [Haskell] by third parties[,] in which [E&M] is joined as a party or inter[]pleads, whether the same proceeds to judgment or not." The fee provision also allowed Haskell to recover its fees from E&M under the same circumstances.

The focus of our inquiry is on whether the fee provision encompassed Haskell's claim for equitable indemnity against E&M. The pertinent right to indemnity is "rooted in principles of equity" (*Exxess Electronixx v. Heger Realty*

Corp., *supra*, 64 Cal.App.4th at p. 714), and "requires no contractual relationship between an indemnitor and an indemnitee" (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1158). Under the rule of equitable indemnity, when two or more tortfeasors jointly cause a single injury, a tortfeasor may obtain partial indemnity from the other tortfeasors on a comparative fault basis. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598.) Thus, "a defendant may ordinarily seek equitable indemnity from another party when the negligent acts of both have combined to cause a single injury to the plaintiff." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1544.)[7]

Here, the plaintiffs' fourth amended complaint alleged several claims against Haskell as a developer, and a single claim of negligence against all the defendants. The record before us discloses that the plaintiffs asserted only their negligence claim against E&M. We therefore conclude that Haskell's cross-action sought equitable indemnification from E&M regarding the damages alleged in connection with the plaintiffs' negligence claim.[8]

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[7] As our Supreme Court explained in *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1018-1019, a good faith settlement (§ 877.6), generally terminates the right to equitable indemnification: when one of a number of tort defendants enters into a good faith settlement with the plaintiffs, the settling defendant "is relieved of any further liability to the nonsettling defendants for equitable indemnity."

[8] Haskell suggests that it also requested equitable indemnity from E&M regarding the damages that the plaintiffs sought through their claims against Haskell as a *developer*. This contention fails on the record before us. Equitable indemnity "is premised on a *joint* legal obligation to another for damages." (*Western Steamship Line, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114, italics added.) Nothing in the record indicates that E&M acted as a developer or that the plaintiffs included E&M as a defendant in their claims against Haskell as a developer.

The fee provision, by its plain language, encompassed Haskell's claim for equitable indemnity. To begin, the provision permits a fee award "in *any* . . . court action *arising out* of this Agreement *or* the enforcement or breach thereof." (Italics added.) Numerous courts have held that provisions containing similar terms authorized awards for tort claims stemming from an underlying agreement. In *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1340-1345, which involved a tort action arising out of a real estate transaction, the court held that the prevailing parties were entitled to their attorney fees when the underlying contract contained the following provision: "'If this Agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto, . . . the prevailing party shall be entitled to recover . . . reasonable attorneys' fees . . . .'" Similarly, in *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797, 1799, the court determined that the prevailing parties in a tort action flowing from a lease were entitled to their attorney fees when the lease accorded such fees "'[i]n any legal action . . . to enforce the terms hereof or relating to the demised premises . . . .'" (Italics deleted.) (See also *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 160 [fee provision permitting recovery of fees in "any action or proceeding arising out of the agreement" authorized award regarding fraud claim grounded in real estate transaction].) Accordingly, the fee provision before us encompassed Haskell's claim for equitable indemnity, which *arose* from work that E&M performed under its agreement with Haskell, even though equitable indemnity -- as a theory of recovery -- does not rely on the existence of a contract.

Moreover, the fee provision expressly permits an award "in *any* action brought against [Haskell] by third parties, in which [E&M] is joined as a party . . . ." (Italics added.) This term of the provision applies squarely to the underlying construction defect action. The fee provision thus manifests an unmistakable intention to permit a fee award under the circumstances present here.

Haskell also maintains that the trial court incorrectly determined that E&M was the prevailing party for purposes of a contractual fee award. We disagree. When, as here, an action is dismissed, the trial court "must look to the parties' contractual attorney's fees provision to determine if it defines who is a prevailing party . . . . If the contract does not provide such guidance, the court must utilize its discretion in determining whether such defendant should be considered a prevailing party for the purpose of recovering attorney's fees as costs . . . . In exercising that discretion, the court may consider the reason for the dismissal, including whether the parties have reached their litigation objectives by settlement, judgment, or other means." (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 452 (*Silver*).) The trial court should be "pragmatic" in "examining the extent to which the parties realized their litigation objectives." (*Id*. at p. 453.)

Instructive applications of these principles are found in *Santisas* and *Silver*. In *Santisas*, a married couple entered into an agreement to purchase a home. (*Santisas*, *supra*, 17 Cal.4th at p. 603.) The purchase agreement provided that the "prevailing party" in a "'legal action . . . arising out of . . . [the] agreement or the sale'" was entitled to reasonable attorney fees, but did not define the term "prevailing party." (*Ibid*.) The buyers later sued the sellers for breach of contract, negligence, deceit, negligent misrepresentation, and suppression of fact. (*Ibid*.) Following discovery, the buyers voluntarily dismissed their action, and the sellers sought a fee award under the purchase agreement. (*Ibid.*) In determining that the sellers were the prevailing parties under the fee provision for purposes of an award in connection with the noncontractual claims, our Supreme Court concluded that the sellers had achieved their "litigation objective," as the buyers had gained no relief, and the sellers had prevented the buyers from obtaining relief. (*Id*. at pp. 607-609.)

In *Silver*, the plaintiffs bought a home pursuant to a purchase agreement containing a fee provision materially identical to the provision in *Santisas*. (*Silver*, *supra*, 97 Cal.App.4th at pp. 445-447.) The plaintiffs sued the sellers, an inspection firm, and other parties for breach of contract, negligence, fraud, and breach of fiduciary duty, asserting that they had suffered approximately $70,000 in damages. (*Id*. at pp. 446-448.) After the plaintiffs settled their claims against all the defendants -- except the inspection firm -- for $68,500, they voluntarily dismissed their action against the inspection firm. (*Id*. at pp. 447-448.) The inspection firm requested a contract-based fee award as the prevailing party, which the trial court denied. (*Id*. at p. 448.) In affirming, the appellate court concluded that despite the judgment in the inspection firm's favor, it had not prevailed, as the plaintiffs' settlements had secured virtually all the relief that they had sought. (*Id*. at pp. 452-453.)

Here, Haskell's cross-action against E&M was dismissed following E&M's good faith settlement with the plaintiffs. As the fee provision contains no definition of "prevailing party," the trial court was obliged to determine the prevailing party (if any) on a pragmatic basis, in light of Haskell's and E&M's litigation objectives.

In our view, the trial court did not err in concluding that E&M had prevailed, even though E&M's $28,200 settlement gave Haskell a portion of the relief it sought, as Haskell would have been entitled to set off the settlement against the plaintiffs' recovery of damages from Haskell (§ 877, subd. (a)). In opposing E&M's first request for a good faith determination, Haskell asserted that

E&M's share of the plaintiffs' damages was $65,804.68; later, in opposing E&M's subsequent requests for a good faith determination, Haskell asserted that E&M's share was at least $155,443.33. As the amount of the settlement was far less that E&M's purported share of liability, the trial court could reasonably conclude that E&M had been successful in achieving its litigation objectives. In sum, we find no error in the trial court's determination that E&M was entitled to a contract-based fee award.

C. *Amount of the Award*

E&M contends that the trial court erred in awarding $2,000 in fees. The crux of its contention is that the trial court disregarded the so-called "lodestar" method in determining the amount of the award. For the reasons explained below, we disagree.

Under the lodestar method, "the trial court begins by fixing a 'lodestar' or 'touchstone' reflecting a compilation of the time spent and reasonable hourly compensation of each attorney or legal professional involved in the presentation of the case. The court then adjusts this figure in light of a number of factors that militate in favor of augmentation or diminution. [Citation.]" (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1171, fn. omitted.) The factors include "the nature and difficulty of the litigation, the amount of money involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case." (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774, italics deleted.) The trial court's application of the lodestar method is reviewed for an abuse of discretion. (*Ibid*.)

Among the factors the trial court may properly consider is the underlying fee agreement between the party and its counsel, although the agreement is not dispositive regarding the amount of an award. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 (*PLCM Group*); *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465, 473.) In suitable circumstances, the trial court may issue an award in an amount less than provided in the underlying fee agreement. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1176 ["The court would not be bound to award the full amount of a contingency fee, simply because a party was actually liable for that amount under a contingency fee agreement."]; *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 522-523 [under lodestar method, the trial court properly awarded party 50 percent of fees owed under contingency fee agreement after assessing reasonable value of counsel's services].)

Under the lodestar method, the trial court may also reduce or deny inflated fee requests. Our Supreme Court has explained: "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. 'If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful. . . .'" (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 635, quoting *Brown v. Stackler* (7th Cir. 1980) 612 F.2d 1057, 1059, fn. omitted.)

Thus, in *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 440-443), the plaintiff asserted a statutory claim for violation of his privacy, alleging damages in excess of $100,000. After a court-ordered arbitration, he received an award totaling $27,500, and requested a statute-based fee award of $428,851.17. (*Id*. at pp. 443-444.) He later asked for an additional

$91,735.91 in fees he had incurred in litigating his fee request. (*Id*. at p. 444.) Applying the lodestar method, the trial court awarded only $75,500.96, pointing to the plaintiff's limited success in the litigation. (*Id*. at p. 445.) The trial court awarded no fees incurred in connection with the plaintiff's fee litigation; in addition, the trial court denied fees incurred in connection with certain unnecessary motions. (*Id*. at pp. 455-456.) In affirming the award, the appellate court concluded that the fee request was "unreasonably inflated." (*Id*. at pp. 455-456.)

Here, E&M's fee request was supported by a declaration and billing records from its counsel, who stated that he had performed 312.9 hours of service, including 54.6 hours in connection with E&M's requests for costs and fees. According to E&M's counsel, he had three hourly rates: a general rate of $400; a contractor rate of $225; and an insurance rate of $175. E&M requested that the trial court apply the general rate, resulting in a lodestar amount of $125,160.

In determining the amount of the award, the trial court noted that although the lodestar method offers protection to attorneys who invest lengthy periods of work in risky cases with little assurance of pay, E&M's counsel had agreed to perform the work in question for a flat negotiated fee of $7,500.[9] The trial court also observed that the action was "a garden variety construction defect case," and that E&M's request encompassed its defective motions for a "good faith"

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[9] According to E&M's showing, the key terms of the fee agreement were as follows: "$7,500 non-refundable, flat fee, classic retainer for all legal services up to 100 days before date first set for trial. At 100 days before said trial date fee converts to [counsel's] then reasonable insurance rate; that rate is [] $175/hour for attorney time . . . ."

determination.[10] In awarding $2,000 in fees, the trial court explained: "I do not think that the totality of the work that was set forth merits an award of anything greater than [] $2,000 . . . . You agreed to a sum of $7,500. I think that's fair and reasonable but I have lowered that amount because of the work that was done specifically concerning this particular [fee] issue."

E&M contends that the trial court disregarded the lodestar method in determining the amount of the fee award. This contention fails on the record before us. When, as here, no party requests a statement of decision in connection with a fee award, the trial court is not obliged to provide a detailed explanation for its ruling. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 342, fn. 6.) In such cases, we will infer all findings necessary to support the award and "then examine the record to see if the findings are based on substantial evidence." (*Finney v. Gomez*, *supra*, 111 Cal.App.4th at p. 545.)

As the court explained in *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101, "there is no general rule requiring trial courts to explain their decisions on motions seeking attorney fees. In cases where the award corresponds to either the lodestar amount, some multiple of that amount, or some fraction requested by one of the parties, the court's rationale for its award may be apparent on the face of the record, without express acknowledgment by the court of the lodestar amount or method. When confronted with hundreds of pages of legal bills, trial courts are not required to identify each charge they find to be reasonable or unreasonable, necessary or unnecessary. The party opposing the fee award can be expected to identify the particular charges it considers objectionable.

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10 In addition, the trial court remarked that it was "a little troubled" that E&M requested approximately $125,000 in fees after "tak[ing] advantage" of the absence of a deadline for opting out under the CMO's "deemed cross-complaint" provision.

A reduced award might be fully justified by a general observation that an attorney overlitigated a case or submitted a padded bill or that the opposing party has stated valid objections."[11]

E&M also contends that the trial court abused its discretion in determining the amount of the award. We disagree. E&M sought fees in connection with items that are reasonably viewed as improper or excessive. Generally, the trial court may reduce a fee award to the extent that the legal services were unnecessary. (See *EnPalm, LLC v. Teitler*, supra, 162 Cal.App.4th at p. 775.) Of the 312.9 hours that E&M's counsel devoted to the action, 78.6 hours -- or approximately 25 percent -- were incurred in connection with E&M's motion for judgment on the pleadings, which challenged Haskell's contract-based claims against E&M. Civil Code section 1717, subdivision (b)(2) bars the recovery of fees related to contract-based claims if "an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case," as there is no prevailing party under section 1717 when these circumstances obtain. (*Santisas*, *supra*, 17 Cal.4th at pp. 617-619.) Here, Haskell voluntarily dismissed its contract-based claims, and its remaining claim for equitable indemnity was dismissed following the good faith settlement.[12]

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11 E&M suggests that during the hearing, the trial court rejected the lodestar method, as the trial court ask E&M's counsel, "Are you telling me that you are going to try and assert . . . some type of lodestar analysis right now?" However, following this question, the trial court noted its familiarity with the lodestar method, described the method's application in complex cases, and explained that under the method, "the court looks at the lodestar and takes a look at some of the factors that are to be garnered." At no point did the trial court expressly decline to apply the method.

12 Before the trial court and on appeal, E&M has conceded that it was not the prevailing party within the meaning of Civil Code section 1717.

The 312.9 hours also encompassed matters that contributed little to the ultimate outcome of the action. At least 44 hours were ascribed to the preparation and litigation surrounding E&M's two unsuccessful motions for a good faith determination.[13] Also included were the hours that E&M's counsel had devoted to negotiating the faulty first settlement, and the 54.6 hours related to E&M's requests for costs and fees.

The trial court's determination of the appropriate number of hours and rate of compensation is subject to deferential review, as "'[t]he []experienced trial judge is the best judge of the value of professional services rendered in his court.'" (*PLCM Group, supra*, 22 Cal.4th at p. 1095, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Because there is substantial evidence that the fee request incorporated many excessive items, the trial court properly looked to the $7,500 retainer fee agreement for assistance regarding the lodestar amount. In view of the trial court's determination that the action was a "garden variety" case, the amount of the retainer fee constituted an appropriate benchmark, as it encompassed services ranging from approximately 19 hours (at the $ 400 hourly rate) to 44 hours (at the $175 hour rate). Moreover, as E&M's fee request was unreasonably inflated, the trial court was authorized to reduce the award from $7,500 to $2,000.

Pointing to *PLCM Group*, E&M maintains that our Supreme Court has "rejected the use of actual fees by a client as the determiner of what is reasonable." However, *PLCM Group* expressly instructs that "[a]lthough the terms of the [fee] contract *may* be considered, they 'do not compel any particular award." (*PLCM*

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13 According to the billing records submitted by E&M, its counsel devoted at least 6 hours preparing E&M's first motion and another 38 hours to matters related to E&M's failed second motion, including opposing ex parte applications regarding the second motion.

Group, supra, 22 Cal.4th at p. 1096, italics added.) For the reasons explained above, the trial court properly examined the fee agreement in determining an appropriate award. We find no error.

DISPOSITION

The fee award is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.